



# STATE OF WISCONSIN

## Division of Hearings and Appeals

---

In the Matter of

Racine County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206813

---

Pursuant to petition filed November 9, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Racine County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a telephonic hearing was held on Wednesday, December 21, 2022, originating from Madison, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Lauren Ciulini  
Racine County Department of Human Services  
1717 Taylor Ave  
Racine, WI 53403-2497

Respondent:

██████████  
████████████████████  
████████████████

**ADMINISTRATIVE LAW JUDGE:**

Peter McCombs  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Racine County. He was approved for FoodShare and received monthly benefits as a group of one person for the month of August of 2022.
2. Respondent was incarcerated during the period of August [REDACTED], 2022 and November [REDACTED], 2022. Exhibit A.
3. While respondent was incarcerated, his girlfriend used or attempted to use his FS card between August 15 – 22, 2022. Exhibit B.
4. The respondent's FS card was deactivated on September 8, 2022.
5. On November 9, 2022, the agency mailed an Administrative Disqualification Hearing Notice to respondent advising him that the agency believed he had committed an intentional program violation and was therefore seeking a one-year disqualification penalty against him, and that a hearing would take place by telephone on December 7, 2022.
6. The hearing notice stated that the agency was alleging that the respondent allowed an unauthorized person to use his FS card while respondent was incarcerated.
7. On November 9, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent allowed an unauthorized person to use his FS card while respondent was incarcerated.
8. The respondent failed to appear for the scheduled December 21, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

## DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, where an overpayment has occurred their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent here failed to appear at the hearing and has not contacted the Division of Hearings and Appeals to claim good cause for failing to appear. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that respondent committed an IPV by allowing an unauthorized individual, his girlfriend, to use his EBT card while he was in jail. Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food *for the household*. 7 C.F.R. §274.7(a). Consistent with the above-cited federal regulation, FS policy states:

The cardholder is the only person that can make authorized purchases on the QUEST card, unless he or she verbally authorizes another person to make purchases on their behalf for their assistance group.

*FoodShare Wisconsin Handbook §7.3.2.4.*

The agency produced sufficient evidence to show that the respondent had allowed someone who was not a member of his FS household to use his FS card while he was incarcerated: Booking information regarding the respondent and his dates of incarceration; the investigation report and testimony of the investigator, Mr. Embry confirming that he spoke with the respondent who acknowledged that he allowed his girlfriend to use his EBT card while he was in jail; a copy of an Enrollment and Benefits booklet that includes information about intentional program violation penalties; and the EBT transaction logs showing FS purchases made with the respondent's card while the respondent was incarcerated.

In the absence of any testimony or evidence from the respondent to rebut the relevant, persuasive evidence that the agency did offer or an alternative explanation for that evidence, I find that the agency properly determined that the respondent engaged in an intentional program violation by allowing his FS card to be used by another individual who was not included in his FS household.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, 7 C.F.R. §274.7(a), a rule that requires that FS is to be used for the benefit of the eligible household to which the FS is issued.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE,** it is

**ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

## APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

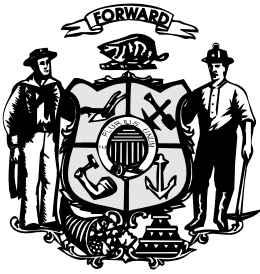
Given under my hand at the City of Madison,  
Wisconsin, this 20th day of January, 2023



---

\sPeter McCombs  
Administrative Law Judge  
Division of Hearings and Appeals

c: WKRP Consortium - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
Lauren Ciulini - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
5<sup>th</sup> Floor North  
4822 Madison Yards Way  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAMail@wisconsin.gov](mailto:DHAMail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 20, 2023.

Racine County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]